IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 20TH MARCH 2007/ 29TH PHALGUNA 1928

OP.No. 4549 of 1999(N)

PETITIONER:

INDIAN ALUMINIUM COMPANY LIMITED
ALUPURAM REPRESENTED BY ITS ASSOCIATE WORKS
MANAGER SRI.C.G.JOLLY

BY ADV. SRI.M.PATHROSE MATTHAI (SR.)
SRI.SAJI VARGHESE

RESPONDENTS:

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1. THE KERALA STATE ELECTRICITY BOARD
VYDHYUTHIBHAVANAM
TRIVANDRUM REPRESENTED BY ITS
CHIEF ENGINEER (TRANSMISSION SOUTH)

2. THE GOVERNMENT OF KERALA REPRESENTED
BY ITS SECRETARY TO GOVERNMENT
GOVERNMENT POWER(A) DEPARTMENT
GOVERNMENT SECRETARIAT, TRIVANDRUM

BY ADV. SRI.R.K.VENU NAYAR, SC, KSEB
SRI.A.SUDHI VASUDEVAN, SC, KSEB

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 20/3/2007 THE COURT ON HE SAME DAY DELIVERED THE FOLLOWING:

O.P No.4549 of 1999 **APPENDIX**

Petitioner's Exhibits

Ext.P1: True copy of the Agreement No.35/95-96 dated 16-6-1995 between the 1st respondent and the petitioner's

Ext.P2: True copy of the letter dated 11-8-1998 sent by the petitioner to the 1st respondent

Ext.P3: True copy of the Bank Guarantee No.796/462/95 dated 18-7-1995

Ext.P4: Tue copy of the revised Bank Guarantee dated 13-07-1998

Ext.P5: True copy of letter dated 10-11-1998 sent by the 1st respondent to the petitioner

Ext.P6: True copy of letter dated 17-11-1998 sent by the petitioner to the 1st respondent

Ext.P7: True copy of the order of Supreme Court of India

Ext.P8: True copy of letter dated 1-2-1999 sent by the 1st respondent to the Manager Deutsche Bank AG, Calcutta

Ext.P9: True copy of letter dated 13-12-1999 by the petitioner before the 1st respondent

Ext.P10.Series: True copies of invoices issued by the first respondent to the petitioner

//True copy//

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PIUS C. KURIAKOSE, J.

O.P. No. 4549 OF 1999

Dated this the 20th day of March, 2007

JUDGMENT

The Indian Aluminium Company has filed this Writ Petition arraying the Kerala State Electricity Board and the Government of Kerala as respondents seeking to quash Ext.P8 letter sent by the Chief Engineer of Electricity Board invoking the Bank Guarantee furnished by the petitioner Company in favour of the Board and also to quash Ext.P5 which is a letter by the Electricity Board turning down the request of the petitioner company for refund of the cash deposit and the Bank Guarantee and directing the petitioner Company to undertake in writing to remit the arrears which are in dispute as soon as the arrears are settled by this Court. Another prayer in the Writ Petition is that the Electricity Board be directed to refund the sum of Rs.1,10,17,000/- together with interest(the cash security amount) and also to return the Bank Guarantee which had been furnished by Deutsche Bank AG,Calcutta on behalf of the petitioner in favour of the Electricity Board.

2. The petitioner Company states that being manufacturers of Aluminium Metal, electricity is its essential and major input and raw material and electricity is being supplied to the petitioner under agreements with the Electricity Board. Petitioner Company was having two different production lines receiving supply of electricity under 66 KV system and

110KV system and Ext.P1 is copy of the agreement dt.16.6.95 governing supply of electricity under 66 KV system. Reference is made to Clause 12 of Ext.P1 which provides that either party to the agreement can terminate the agreement by issuing three month's notice by registered post. Petitioner states that frequent enhancement of tariff by Board was found uneconomical by the Company, and the Company issued Ext.P2 letter giving notice of termination of Ext.P1 to the 1st respondent. It is also stated that the Company had already shut down the eletrolytic pots or cells in the production line receiving the supply under the 66 KV system. The petitioner further states that on the terms of Ext.P1 the petitioner had to offer security by way of Bank Guarantee for electricity charges equivalent to two months' charges and accordingly Bank Guarantee for an amount of Rs.2,20,33,000/- was furnished to the 1st respondent on the petitioner's behalf by the petitioner's Bank Deutsche Bank A.G. Ext.P3 is copy of that Bank Guarantee. Later consequent on an amendment to the conditions of supply of electrical energy the petitioner becomes obliged to make a cash deposit of Rs.1,10,17,000/- and furnish revised Bank Guarantee for Rs.1,10,30,000/- in substitution of Ext.P3. Ext.P4 is copy of the revised bank guarantee furnished. The petitioner points out that bank guarantee was furnished strictly in accordance with Clause 3 of Ext.P1 for supply of

Electricity and for payment of electricity or current charges alone. The agreement did not relate to collection or payment of electricity duty under the Electricity Act 1963 at all. Petitioner submits that after terminating Ext.P1 the petitioner had requested the 1st respondent-Board to refund the cash deposit of Rs.1,10,17,000/- and to return the bank guarantee-Ext.P4. Though Ext.P2 was sent on 11.8.98, the 1st respondent responded to the same only on 10.11.98 alleging that their special officer(Revenue) has reported that an amount of Rs.5,27,56,927/- is outstanding against 66 KV supply system by way of arrears of current charges as on 30.9.98. Ext.P5 is copy of the letter dt.10.11.98. Petitioner alleges that Ext.P5 contains deliberate and blatant falsehood made with the objective of denying repayment of the cash deposit and return of bank guarantee. There was absolutely no arrears of current charges payable by the petitioner to the KSEB. With the objective of denying payment and return of the bank guarantee it is stated without any bonafidies in Ext.P5 that the arrear accrued consequent to remittance of duty at 1 paise per unit instead of 10 paise for which an SLP is pending before the Hon'ble Supreme Court and an original petition is pending before this Court and therefore the Petitioner's request cannot be considered. Petitioner submits that the petitioner has no liability at all to pay electricity duty while a sum of Rs.1033.05 lakhs is to

be refunded to the petitioner, the illegally collected electricity duty, as directed by this Court. Petitioner describes Ext.P5 as a dishonest and fraudulent attempt on the part of the 1st respondent to deny refund of cash deposit and return of bank guarantee. The Petitioner protested against Ext.P5 by their letter dt.17.11.98 and a copy of that letter is Ext.P6. Petitioner points out that there has been no response to Ext.P6 so far.

3. The petitioner submits that the Kerala Government had granted to the petitioner reduction in payment of electricity duty payable under the Kerala Electricity Duty Act,1963 in exercise of its powers under the proviso to Section 4 of that Act. In order to override the special agreements under which the Board was being supplied with electricity power to the Petitioner, the Government issued an ordinance which was latter replaced by Electricity Supply Kerala Amendment Act, 1983. Pursuant to that amendment, the KSEB had charged the petitioner at higher electricity tariff applicable to extra high tension consumers of electricity from the month of March 1983. Apart from that the Board demanded electricity duty also from the petitioner at the full rate, consequent of the above said amendment Act. The constitutional validity of the amendment Act as well as the demand for electricity duty at full rate was challenged by filing OP No.10002 of 1983. A Division Bench of this Court by its judgment dt.17.2.1989 quashed the

demand for electricity duty at full rate and directed the respondent to refund or adjust the duty illegally collected from the petitioner amounting to Rs.1033.05 lakhs. The review petition filed by the Electricity Board in respect of that judgment was dismissed. Appeals have been preferred against that judgment by the Electricity Board and also by the Petitioner(to the extent the constitutional validity of the Amendment Act was upheld). But the Electricity Board's application for stay of the operation of the judgment of this Court in OP No.10002 of 1983 and the order in RP No.148 of 1989 was dismissed by the Supreme Court and Ext.P7 is copy of that order. Even after the stay petition was dismissed the respondents have not cared to refund the amounts collected by way of electricity duty though several demands were made in that regard. In order to circumvent the order and direction of this Court to refund the electricity duty, the Electricity Board has issued an order demanding payment of electricity duty at full rate. That order has been stayed by this Court in OP No.3872 of 1992. It is in that context that the 1st respondent has now resorted to malafide action of invoking the bank guarantee furnished under Ext.P1. Ext.P8 letter has been sent by the concerned Chief Engineer to the Manager of the guarantor bank. Ext.P8, the petitioner contends is totally illegal and without authority of law and is vitiated by malafides. The demand is totally outside the terms and

conditions of the bank guarantee which was specifically furnished under Ext.P1 and for no other purpose. Bank guarantee has been invoked for an extraneous purpose. The 1st respondent being the State for the purpose of Article 12 of the Constitution is not entitled to act in an arbitrary and unfair manner against the petitioner. Such arbitrary action amounts to negation of equality violating petitioner's fundamental rights guaranteed under Article 14. On the above facts this Writ Petition has been filed seeking the reliefs already indicated.

4. A counter- affidavit has been filed by the 1st respondent Electricity Board. It is contended that though it is true that under clause 12 of the EHT agreement either party can terminate the agreement by issuing three months notice by registered post, at the time when the petitioner made their request for terminating the agreement for returning the cash deposit and the Bank guarantee furnished against the security deposit , huge amounts were due from the petitioner which include arrears consequent on remittance of electricity duty at the rate of 1 paisa per unit instead of 10 paisa per unit for which CA No. 2007/90 was pending before the Honourable Superme Court. The said fact regarding arrears was intimated to the petitioner. It is then stated in the counter- affidavit that

does not deny. the petitioner's averments that based on the amendment of clause 3 of the agreement security deposit of the petitioner for 66KV consumer was fixed as Cash deposit for Rs. 1,10,17,000/- and the Bank guarantee for an equivalent amount and the same was collected from the petitioner. The affidavit contends that as per the conditions of supply of electrical energy , security deposit is collected from the consumers to ensure the payment of monthly current charges and for the safe custody of Board's installations in consumer's premises Electricity duty also forms a part of monthly current charges. Hence segregation of duty from current charges with regard to the payment of security deposit is not permissible while collecting security deposit. Therefore the petitioner's contention that the agreement does not relate to electricity duty is not correct. The counter- affidavit proceeds to contend that at the time when notice was given for termination of the agreement a sum of Rs. 5,27 56,927/- was due as on 30-9-1998 consequent on the remittance of electricity duty at a revised rate and the issue was pending before the Supreme Court and this Court. This amount was much more than the security deposit and the bank guarantee amount together and this is why the petitioner's request was not allowed. It is further contended that after filing of the present O.P the supreme Court has pronounced the judgment in CA 2007/1990 and

connected cases . Under this judgment the supreme Court upheld the order of this Court that concessional the rate of supply of Electricity incorporated in the special agreement under Section 49 (3) of the Electricity Supply Act entered into between the Indian Aluminium Company (Petitioner) and the K.S.E.B was validly rescinded by the statutory amendment incorporating subsection 5 of Section 49 of the Electricity Supply Act. The agreement was not rescinded wholly but concessional rate at which the company was receiving electricity alone was rescinded. For all other purposes the agreement is binding. The counter concedes that the Supreme Court upheld this Court's judgment that the demand of Electricity duty at the rate specified under the Electricity Duty Act which were inexcess of the concessional duty agreed upon in the special agreement was invalid. The counter- affidavit then submits that the agreement signed between the company and the K.S.E.B years back is not traceable and therefore the period of currency of the special agreement is also not known now. Therefore the date from which the invoices are to be revised cannot be identified now. The arrears outstanding against the petitioner include short remittances made by the petitioner following self-assessment of current charges by unilaterally clubbing facility even after the same has been dispensed with on lifting of power cut . All these led to

the accrual of the huge arrear and the exact amount of arrears could not be worked out yet. Earnest attempts are being made to work out the split up details of arrears. Therefore the request of the petitioner for returning the bank guarantee and cash deposit was not allowed. It is then alleged that following the G.O (Rt) 122/91/PD dated 19-8-1991 the petitioner unilaterally adjusted Rs. 1,033.05 lakhs which the Board is alleged to have realised from the petitioner by way of Electricity duty at 10% per unit for short remitting of the current charge bills from 11/99 to 3/2000. Prominently it is contended that the Bank guarantee can be invoked for payment of Electricity Duty also and that Electricity duty also forms a part of monthly current charges. The charges reported by the special Officer (Revenue) include the arrears accrued by way of duty among others. In clause 3 of Ext.P1 agreement it is stated that the board has liberty at any time to appropriate and apply any security so furnished in or towards payment or satisfaction of all or any moneys which shall become due from or owing by the consumer to the Board in respect of supply of energy or otherwise under the agreement Accordingly the Board is eligible for invoking the Bank Guarantee for meeting arrears.

5. The petitioner filed a reply affidavit to repudiate all the

contentions. The reply affidavit is sworn to by the Vice-president of the Hindalco Industries Limited to which the assets , undertakings and liabilities of Indian Aluminium Company has been transferred by a scheme of Arrangement under Sections 391 to 394 of the Companies Act. It is contended that clause 12 of Ext.P1 agreement is binding on the KSEB as well as the petitioner. Under that clause the agreement is terminable by either party by issuing three months notice by Registered Post and there is no condition or restriction on the right of the parties to terminate the agreement. Clause 3 of Ext. P1 agreement and Regulation 14 of the conditions of supply of Electrical energy are referred to. But in the reply affidavit the contention of the agreement that charges include electricity duty also is stoutly denied and is described as baseless and untenable. The allegation that at the time when termination was made, there was arrears to the tune of Rs. 5,27,56.927 on account of remittance of electricity duty at the rate of Rs. 1 Paise per unit is also denied . The Supreme Court dismissed the appeal preferred by the Electricity Board and the State against the judgment of this Court demanding Electricity duty at the higher rate. Strong exception is taken to the contention that the special agreement is not traceable now and therefore the period of currency of the agreement is not known. The denial of clubbing facility to

the petitioner by the respondent during power cut has been declared illegal and unconstitutional by this Honourable Court in O.P Nos. 7350 of 1986 and O.P No.10472 of 1998. The contention based on the G.O dated 19-8-1991 is answered by contending that the G.O is void and ineffective and it is contrary to the judgment of this Honourable Court in O.P No. 10002 of 1983. It is pointed out that the amount of Rs. 1033.05 lakhs refundable by way of Electricity duty was not refunded in spite of the judgment by this Court and dismissal of the appeal of the respondents. The petitioner after issuing due notice adjusted the amounts against the subsequent bills. Ext.P9 is that letter dated 13-12-1999. The Board having accepted the decision of this Court and Supreme Court regarding Electricity duty has subsequently been demanding duty only at the revised rate of 1 Paise in the series of invoices are relied on .

6. I have heard the submission of Sri. M. Pathrose Matthai senior counsel for the petitioner and those of Sri. Sudhi Vasudevan standing counsel for the Kerala State Electricity Board . Sri. Pathrose Mathai would invite my attention to Ext.P1 agreement particularly to clauses 3 and 12. He invited my attention also in Ext.P2 P5 and P6 . The learned counsel would rely on the judgment of this Court, in **State of**

Kerala Vs. Indian Aluminum Co.Ltd 1999 (2) KLT 201 and would place before me copies of the judgments in O.P No7350 of 1986 and the judgment of the Division Bench in O.P No. 14472/1998, I sent for the judges papers in O.P No. 10002/1983 and in O.P 3872/1992 and perused the same.

7. Mr. Sudhi Vasudevan learned standing counsel for the Electricity Board would try to answer the submission of the petitioner on the basis of the contentions raised in the counter- affidavit.

8. Having considered the rival pleadings and the various documents placed on record and having appreciated the rival submissions made at the Bar I do not find reason as to why the relief sought for should not be granted to the petitioner company. It is not disputed that Ext.P1 is true copy of the agreement executed between the parties regarding supply of Electricity under the 66 KV System and that the same is binding on the parties. Clauses 3 6, 9 and for that matter a survey of the entire agreement will show that the security deposit and Bank guarantee was given only in the context of the liability of the consumer to pay Electricity charges and not for payment of Electricity duty. The issue of

the petitioner's liability to pay Electricity duty was an entirely different issue and the said issue had been settled by decisions of this Court later confirmed by the Supreme Court. The respondent Board was not justified in mixing up that issue with the petitioner's entitlement of getting back the security deposit and the Bank Guarantee furnished by way of Security for the prompt performances of their obligations under Ext. P1, with the issue of the petitioner's liability for payment of Electricity duty I am not convinced that apart from the alleged liability for electricity duty as on the date the petitioner demanded the security amount the petitioner was in arrears on account of current charges. Clause 12 of Ext.P1 reads as follows:

" The Board and the consumer hereby agree that it shall be competent to either party to terminate this agreement by issue of a three months notice by Registered post"

9. So far as I see the Ext.P2 was a valid notice terminating Ext.P1 in terms of clause 12. The Board according to me was not justified in refusing to pay the security deposit amount and in invoking the bank guarantee after the petitioner has terminated Ext.P1 agreement by issuing Ext.P2 notice. The action impugned in the writ petition was certainly

unlawful in view of the various decisions of this Court and the Supreme Court which were binding on both the parties. Significantly the termination Clause 12 in Ext. P1 will show that sanction of the Electricity Board or any higher officers of the Board is not required for the termination and that the right which is conferred on the parties under clause 12 for terminating the agreement is an absolute one. I am not impressed by the stand of the K.S.E.B that the special agreement signed between the parties is not traceable because of which period of currency of the special agreement is not known now and that because of the same the Board is not able to furnish the details of short remittances by the petitioner towards current charges. years have passed by and even now the split up details have not been worked out by the respondents, The accusation that the petitioner has unilaterally adjusted the sum of Rs. 1033.05 lakhs , the excess payments made on account of electricity against the current bills also does not appeal to me . The petitioner according to me was justified in doing so in the light of the judgment of this court and the dismissal of the appeal by the Supreme Court. The adjustment was only after issuing notice to the respondents and Ext.P9 will support the above defence of the petitioner.

10. The result is that the petition will stand allowed. There will be

as direction to the respondent to refund the sum of Rs. 1,10,17000/- i.e. The security deposit amount to the petitioner within one month of receipt of a copy of this judgment. There will be a further direction to return the bank guarantee dated 13-7-1998 furnished by Deutsce Bank (AG) Calcutta to the respondent on behalf of the petitioner also within the aforesaid period. If the above directions are complied with by the respondents within one month of receiving a copy of this judgment the security deposit amount will carry interest at the rate of Rs. 12% per annum till the date of payment in full

Allowed. No costs

PIUS.C.KURIAKOSE, JUDGE

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